83-34

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

IN THE MATTER OF:

NORTHLAND POINT PARTNERS,
Debtor.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a New Jersey corporation,
Respondent,

v.

THE STOUFFER CORPORATION,
an Ohio corporation,
Petitioner.

NORTHLAND POINT PARTNERS,
an Illinois limited partnership,
Respondent,

v.

THE STOUFFER CORPORATION,
an Ohio corporation,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the district court have the authority to enact the interim rule which confers jurisdiction upon bankruptcy courts and automatically refers this proceeding to the bankruptcy court for trial?

2. Is the interim rule, which allows this proceeding involving solely private state law claims to be tried by the bankruptcy court, valid?

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OPINIONS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit, entered on April 14, 1983, is contained in Appendix A. The opinion and Order of the District Court for the Eastern District of Michigan, entered on January 7, 1983, is reported at 26 B.R. 860 and is contained in Appendix B. The District Court's supplementary Memorandum Opinion, entered on February 8, 1983, is reported at 26

B.R. 1019 and is contained in Appendix C. The district court's Order certifying the question for appeal to the Sixth Circuit was entered on February 25, 1983, and appears at Appendix D.

JURISDICTION

The decision of the court of appeals was filed on April 14, 1983. This Petition for Writ of Certiorari was filed within ninety (90) days of that date. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

United States Constitution, Article III, §1 and §2 (Appendix G).

11 U.S.C. §105 (Footnote 11).
28 U.S.C. §636(b) (Appendix H-1).
28 U.S.C. §1334 (Footnote 9).
28 U.S.C. §1471 (Appendix H-2).
28 U.S.C. §1480 (Appendix H-3).
Federal Rule of Civil Procedure 53(b) (Appendix I).

Interim rule of the District Court for the Eastern District of Michigan, adopted December 13, 1982 (Appendix E).

STATEMENT OF THE CASE

A. History of This Case

Northland Point Partners, an Illinois limited partnership (Northland Point), is the owner of a parcel of land in Southfield, Michigan. A 220-room hotel known as The Northland Inn is located on a portion of this property. The hotel is leased through 1986 from Northland Point by petitioner, The Stouffer Corporation, an Ohio corporation (Stouffer). The Prudential Insurance Company of America, a New Jersey corporation (Prudential), holds a

$12,000,000 mortgage on the entire parcel and has an alleged assignment of the Stouffer lease as additional security for the mortgage.

In August, 1981 Stouffer closed the hotel. Two substantially identical lawsuits were brought in August and September, 1981 against Stouffer to compel reopening of the hotel and to recover damages for various alleged breaches of the lease between Stouffer and Northland Point.

The first action was filed by Northland Point in state court and was removed by Stouffer to the District Court for the Eastern District of Michigan, pursuant to its diversity jurisdiction. Prudential brought the second action directly in the District Court for the Eastern District of Michigan as a diversity action. Both cases involve purely private state law claims relating to the interpretation and the enforcement of a lease; neither case involves any federal claims.

On September 24, 1982, after both cases had remained in the district court for over a year before separate judges, Northland Point filed a petition under Chapter 11 of the Bankruptcy Code. Northland Point and Prudential then removed the Stouffer cases to the bankruptcy court pursuant to the provisions of 28 U.S.C. §1478, invoking jurisdiction under §1471. The cases were assigned to a single bankruptcy judge, consolidated, and set for trial on January 13, 1983.

B. Northern Pipeline and the Interim Rule.

On June 28, 1982, the United States Supreme Court, in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982), determined that the grant of jurisdiction to the bankruptcy courts contained in 28 U.S.C. §1471 is unconstitutional. The Court's stay of that judgment terminated on December 24, 1982.

On December 13, 1982, at the direction of the Judicial Council for the Sixth Circuit, the District Court for the Eastern District of Michigan adopted a rule (the "interim rule") which became effective December 25, 1982 *(see* Appendix E), automatically referring bankruptcy cases and all "related proceedings" to the bankruptcy judges of the

district. A substantially similar rule has been adopted in all other federal districts. /

C. Stouffer's Motion to Dismiss or for Withdrawal of Reference.

On January 3, 1983, Stouffer filed a motion for dismissal of these actions for lack of jurisdiction or, in the alternative, for a withdrawal of the automatic reference to the bankruptcy court, on the grounds that: (1) the bankruptcy court lacked jurisdiction to hear them after the stay of the *Northern Pipeline* decision had expired, and (2) the interim rule was unconstitutional.

Pursuant to the district court's Amended Administrative Order, issued on January 4, 1983 *(see* Appendix F), all challenges to the constitutionality of the interim rule, including Stouffer's motion, were assigned to District Judge Robert E. DeMascio for hearing. On January 7, 1983, without response from the plaintiffs and without argument, Judge DeMascio issued an order in this case, denying Stouffer's motions and holding that the interim rule was constitutional. *See* Appendix B. On February 8, 1983, the court issued a supplementary Memorandum Opinion that reaffirmed and incorporated the January 7, 1983 order. *See* Appendix C.

D. The Decision of the Sixth Circuit.

On February 25, 1983, pursuant to 28 U.S.C. §1292(b), the district court amended its order to certify it for appeal. *See* Appendix D. On March 4, 1983, Stouffer filed a Petition for Permission to Appeal with the Court of Appeals for the Sixth Circuit. No timely responses were filed. On April 14, 1983, relying exclusively on its April 1 decision in *White Motor Corp.* v. *Citibank, N.A.*, 704 F.2d

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/ A subcommittee of the Judicial Conference drafted a model rule to cope with the aftermath of the expiration of the *Northern Pipeline* stay. The model rule was sent to each circuit and district court. The Judicial Councils of the eleven circuits then directed the district courts to adopt the model rule with minor modifications. *White Motor Corp.* v. *Citibank, N.A.*, 704 F.2d 254, 256 (6th Cir. 1983).

254 (6th Cir. 1983), the Sixth Circuit entered an order denying Stouffer's Petition for Permission to Appeal. *See* Appendix A. These cases have not been rescheduled for trial and apparently remain in limbo somewhere in the federal court system.

REASONS FOR GRANTING THE WRIT

Introduction

The Court is already familiar with most of the issues raised in this petition. The underlying substantive question — whether bankruptcy judges, who lack the attributes prescribed in Article III of the Constitution, can try cases involving state-created private rights — was heard and decided by the Court over a year ago in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982). In that case the Court held that bankruptcy courts could not exercise the judicial power over state-created private rights conferred on them by 28 U.S.C. §1471. In the same decision, the Court declined to correct the defect in the statute, saying that this responsibility should be left to Congress. 73 L. Ed. 2d at 625-26 n.40.

This case involves three issues: (1) whether the Court will allow a bankruptcy court to try a *Northern Pipeline* case against the will of the petitioner; (2) whether the Court will sanction an interim rule which creates a bankruptcy system containing the same defects rejected in *Northern Pipeline;* and (3) whether the Court will allow the lower courts to violate the concept of separation of powers established by the Constitution, which provides that only Congress can restructure the bankruptcy court system.

Important questions of federal law are raised by the interim rule and demand the attention of this Court. The Court in *Northern Pipeline* indicated that Congress must restructure the bankruptcy system to conform to Article III. Congress has failed to act. To fill the void, the Judicial Council of the United States and the district courts have created a bankruptcy court system by rule. Many bankruptcy courts throughout the circuits have issued opinions

declaring the rule unconstitutional and have declined to exercise the jurisdiction the rule purports to give them.[2]

The district courts who adopted the rule then were asked to decide its validity. Not surprisingly, most of the district courts[3] and all of the circuit courts[4] who have ruled on the issue have upheld both their right to adopt the rule and its validity. At least five times, other litigants have requested that this Court review the constitutionality of the interim rule.[5]

It is the responsibility of the Supreme Court to supervise the judicial system and insure the integrity of the constitutionally required separation between the functions of the three branches of government. Litigants such as the petitioner face trials before constitutionally defective courts or the prospect of being bounced around in the federal court system as long as the issues underlying the validity of the rule remain festering. Congress has not acted and its summer recess is about to occur, inevitably prolonging any action by that body. Although this question may be one which the Court "would gladly avoid," intervention in such cases is "the Court's duty," as articulated in *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821), and recently repeated in *Immigration & Naturalization Service* v. *Chadha*, 462 U.S. ____ (1983).

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[2] After one bankruptcy judge issued such an opinion (Judge Merrick of the Northern District of Illinois (*In re Wildman*, No. 81-B-5869, May 6, 1983)), most of his docket was reassigned to other bankruptcy judges by the district court. (Ranii, *Bankruptcy Judge Loses His Docket*, Nat'l L.J., June 27, 1983 at 3).

A list of bankruptcy court decisions which have considered the validity of the interim rule is set forth in Appendix J-1.

[3] A list of district court decisions which have considered the validity of the interim rule is set forth in Appendix J-2.

[4] A list of circuit court decisions which have considered the validity of the interim rule is set forth in Appendix J-3.

[5] These cases are listed in Appendix J-4.

I. THE DECISION OF THE SIXTH CIRCUIT IS IN CONFLICT WITH THE DECISION OF THIS COURT IN *NORTHERN PIPELINE CONSTRUCTION CO.* V. *MARATHON PIPE LINE CO.*

In *Northern Pipeline,* this Court held that a suit brought by the debtor against a non-debtor defendant, based entirely upon state law causes of action, could not be tried by the non-Article III bankruptcy court. It therefore affirmed the district court's order granting the defendant's motion to dismiss for lack of subject matter jurisdiction.

This case involves actions by the debtor and by a third party against Stouffer, a non-debtor defendant, based entirely upon state law causes of action. Pursuant to the interim rule, the cases have been automatically referred to the bankruptcy court for trial. Because *Northern Pipeline* held that such actions could not be tried by a non-Article III bankruptcy court, Stouffer moved to dismiss for lack of subject matter jurisdiction. Contrary to the Court's holding in *Northern Pipeline,* Stouffer's motion to dismiss has been denied. By orders of the district court and of the Sixth Circuit, the instant proceeding is to be tried by the non-Article III bankruptcy court. Those orders are in direct conflict with the Supreme Court's holding in *Northern Pipeline.*

A. The District Court Had No Authority To Enact The Interim Rule Referring This Case To the Bankruptcy Court For Trial.

Through the interim rule, the district court confers jurisdiction on the bankruptcy courts over proceedings involving solely state-created private rights and related to bankuptcy only because a party to the proceeding is a debtor in bankruptcy ("related proceedings"). Implicit in this delegation is the erroneous assumption that the district court retains jurisdiction over related proceedings after *Northern Pipeline.* Because there are no valid sources of district court jurisdiction over related proceedings, there is no jurisdiction which can be conferred by the interim rule.

1. This Court Held In *Northern Pipeline* That §1471 Was Unconstitutional In Its Entirety.

At a minimum, the Court in *Northern Pipeline* found 28 U.S.C. §1471 *(see* Appendix H-2), in its entirety, unconstitutional as applied to related proceedings. The Court found that the unconstitutional grant of jurisdiction over related proceedings to non-Article III bankruptcy judges existed in a single indivisible statutory scheme. This scheme conferred broad jurisdiction in a single grant to both the district and bankruptcy courts by first conferring that jurisdiction upon the district court in §1471(a) and (b), and then immediately withdrawing that grant by reconferring the same jurisdiction upon the bankruptcy court in §1471(c). *See Northern Pipeline,* 73 L. Ed. 2d at 625. Congress set up this scheme with the intent to place all proceedings relating to and arising in or under the Bankruptcy Code in a single forum. S. Rep. No. 989, 95th Cong., 2d Sess. (1978). It did not intend that independent jurisdiction would lie in both the bankruptcy and district courts.

The Court in *Northern Pipeline* recognized the indivisible nature of this scheme. It therefore held that §1471 failed in its entirety and that the entire scheme would need revision. The plurality stated:

> It is clear that, at the least, the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against Marathon. As part of a comprehensive restructuring of the bankruptcy laws, Congress has vested jurisdiction over this and all matters related to cases under title 11 in a single non-Art III court, and has done so pursuant to a single statutory grant of jurisdiction. In these circumstances we cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankrupty court over these matters, leaving the jurisdictional provision and adjudicatory structure intact

> with respect to other types of claims, and thus subject to Art III constitutional challenge on a claim-by-claim basis. *Indeed, we note that one of the express purposes of the Act was to ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdictional disputes.* See HR Rep No. 95-595, *supra*, p 43-48; S Rep No. 95-989, p 17 (1978). Nor can we assume, as The Chief Justice suggests, post, at ___, 73 L Ed 2d 629, that Congress' choice would be to have this case "routed to the United States district court of which the bankruptcy court is an adjunct". We think it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Art III, in the way that will best effectuate the legislative purpose.

Northern Pipeline, 73 L. Ed. 2d at 625-26 n.40 (emphasis added).

The concurring opinion adopted this view of §1471 and agreed in the holding that §1471 in its entirety was unconstitutional as applied to related proceedings. Justice Rehnquist stated:

> I would, therefore, hold so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit over Marathon's objection to be violative of Art III of the United States Constitution. *Because I agree with the plurality that this grant of authority is not readily severable from the remaining grant of authority to Bankruptcy Courts under §241(a), see ante, n. 40, 73 LEd 2d 625-626, I concur in the judgment.*

Northern Pipeline, 73 L. Ed. 2d. at 628 (emphasis added). Thus, a majority of the Court found §1471, in its entirety, unconstitutional as applied to Northern's lawsuit against Marathon.

Because the constitutionally defective portion of §1471 could not be severed from the remainder of the

statute, this Court affirmed the dismissal for lack of subject matter jurisdiction. Had this Court believed that §1471(b) could survive absent 1471(c), the adversary proceeding would have been transferred to the district court for further action. However, because the Court found that all of the federal court jurisdiction in §1471 had to fail, the proceeding was dismissed.[6] Section §1471 did not survive the Court's decision in *Northern Pipeline.*[7]

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[6] The fact that a majority of the Court dismissed Northern's adversary proceeding against Marathon is even more significant in light of the views expressed by Justice Rehnquist in his concurring opinion. Justice Rehnquist cited two constitutional principles aimed at limiting the scope of constitutional holdings:

> "(O)ne, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." 73 L. Ed. 2d at 627 (citing *Liverpool, New York & Philadephia S.S. Co.* v. *Commissioners of Emmigration,* 113 U.S. 33, 39 (1885)).

Despite these principles, he concurred in affirming the dismissal of the lawsuit. Thus, his opinion supports the finding that jurisdiction in the district court under §1471(b) could not survive the constitutional defect relative to bankruptcy judges in §1471(c).

[7] Whether or not the Court explicitly recognized that §1471 had to fail in its entirety because of its indivisible nature, the well-settled principles of severability mandate a finding that the constitutional defect in §1471 impairs the constitutional validity of the entire jurisdictional scheme. It is firmly established that the valid portion of a statute cannot be severed from the invalid portion when the legislature would not have enacted the valid portion without the invalid portion. *Buckley* v. *Valeo,* 424 U.S. 1, 108 (1976); *Champlin Refining Co.* v. *Corporation Commission,* 286 U.S. 210, 234 (1932); *Hejira Corp.* v. *MacFarlane,* 660 F.2d 1356 (10th Cir. 1981).

The legislative intent in enacting §1471 was clearly to create a non-severable jurisdictional scheme. Congress did not intend to grant jurisdiction to the district courts independent and separate from the bankruptcy courts, but rather intended to eliminate a bifurcated jurisdictional scheme:

> It is the purpose of new section 164 of title 28, United States Code, in conjunction with 28 U.S.C. section

(Continued on next page)

2. Even If §1471(b) Is Not Unconstitutional As a Result Of The Holding In *Northern Pipeline*, It Is Unconstitutional Because It Purports To Bestow Jurisdiction Over Cases Which Are Outside The Limits Of Article III.

Assuming that §1471 is severable, §1471(b) is nevertheless unconstitutional as applied to this proceeding, because it exceeds the constitutional scope of federal court jurisdiction. Congress derives its authority to establish lower courts from Article I and Article III, §1 of the Constitution. However, the jurisdiction which it can confer upon Article III courts is limited by Article III, §2. *See Northern Pipeline, National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582 (1949). Because §1471(b) exceeds the scope of Article III as applied to this proceeding, it must be held unconstitutional.

This Court's holding in *Northern Pipeline* affirms the proposition that Article III defines the limits of federal jurisdiction over *related proceedings*. The *Northern Pipeline* holding renders inconceivable the proposition that federal courts can look to Article I as a possible source of the jurisdiction conferred over related proceedings by §1471. Indeed, if the constitutional basis for §1471's grant of jurisdiction over related proceedings to the federal courts could be found in Article I, this Court would *not* have held that the jurisdiction over such proceedings had to be exercised by Article III judges. Thus, to confer jurisdiction over related proceedings, §1471 must find its constitutional basis and its constitutional limitations in Article III.

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> 1334, as amended by section 216 of this act *to eliminate entirely the present jurisdictional dichotomy between summary and plenary jurisdiction* . . . (A)ll cases under title 11 and *all civil actions and proceedings arising under or related to cases under title 11 are to be before the bankruptcy judge* (emphasis added).

S. Rep. No. 989, 95th Cong., 2d Sess. 18, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5804. *See also* H.R. Rep. No. 595, 95th Cong, 2d Sess. 52, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6013. Thus, Congress would never have enacted §1471(a) and (b) without 1471(c).

This proposition, which was affirmed by the Court in *Northern Pipeline*, is consistent with the view espoused by a majority of the Supreme Court in *National Mutual Insurance Co.* v. *Tidewater Transfer Co.* In *Tidewater*, the Court considered the constitutionality of a statute which extended diversity jurisdiction to the district courts over cases between citizens of the District of Columbia and citizens of the states. Two issues were raised in connection with the resolution of this question: (1) whether Congress derived its authority to enact that statute from its Article I, §8, 17 power over legislation in the District of Columbia, or (2) whether Congress' authority to enact that statute was limited by the scope of federal judicial power as defined in Article III. Although the statute was sustained by a majority of Justices who espoused different theories for that result, six Justices concurred in the view that the Article III district courts could not be vested with powers, by virtue of the other provisions of the Constitution, that were not found within Article III. *Tidewater*, 377 U.S. at 607, 629-30, 652-53. Thus, a majority of the Court agreed that Congress could not constitutionally confer upon Article III courts jurisdiction that was beyond the scope of judicial power as defined in Article III.[8]

Article III does not allow the district court to exercise jurisdiction over the instant case pursuant to its bankruptcy jurisdiction. Federal court jurisdiction over this proceeding is presently invoked only under §1471. Jurisdiction is therefore permitted under Article III only if the proceeding can

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[8] Prior to the decision in *Tidewater*, the Court upheld federal court jurisdiction over state law claims between a trustee in bankruptcy and non-diverse defendants in *Schumacher* v. *Beeler*, 293 U.S. 367 (1934) and *Williams* v. *Austrian*, 331 U.S. 642 (1947). However, these cases are not controlling in light of *Tidewater* and *Northern Pipeline* and should be limited to their actual holdings. In *Schumacher*, the defendant consented to the subject matter jurisdiction of the federal court and the issue of the constitutionality of the statute which enabled the federal court to exercise jurisdiction upon consent of the defendant was not before the Court. In *Williams*, the Court construed a statute enabling the federal court to exercise jurisdiction in a matter related to a reorganization proceeding and did not specifically address the question of the Constitutional source of Congressional authority to grant such jurisdiction.

be said to "arise under the Laws of the United States". Because this proceeding cannot be deemed to fall within this federal question jurisdiction, §1471(b) cannot constitutionally be used as a basis for jurisdiction.

To satisfy the federal question basis for jurisdiction, the proceeding must either: (1) arise under a federal law, or (2) be pendent or ancillary to a federal law or question. This proceeding is neither. The claims involved do not arise under federal law. *Gully* v. *First National Bank*, 299 U.S. 109, 112 (1936) (for a cause of action to arise under federal law a right or immunity created by the federal law must be an essential element of the cause of action). The claims in this proceeding are traditional common law claims arising solely under state law.

The claims in this proceeding are not pendent or ancillary to a federal question or law. They do not fall within pendent jurisdiction because these state law claims do not have a "common nucleus of operative fact" with the bankruptcy action. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966). Neither do the claims fall within ancillary jurisdiction. They are not *incidental* to a matter properly before the court. The concept would have to be unreasonably stretched to encompass a case such as this one. *See* Wright, *Law of Federal Courts* §9 (3d ed. 1976).

It cannot be argued that the jurisdiction granted by §1471(b) over this proceeding falls within the permissible limits of Article III federal question jurisdiction of the Court. As such, §1471(b) *cannot* be deemed to provide the district court with jurisdiction over this proceeding or with the power to delegate some or all of that purported jurisdiction to the bankruptcy courts through the interim rule.

3. Absent §1471, There Is No Source Of Jurisdiction Upon Which The District Court Can Rely To Enact The Interim Rule.

In *White Motor*, the Sixth Circuit espoused the view that "(e)ven assuming, arguendo, that the Supreme Court invalidated all of §1471, the district courts retain original jurisdiction over bankruptcy matters under 28 U.S.C.

§1334." *White Motor,* 704 F.2d at 260.[9] However, the use of §1334 as a source of this jurisdiction has been discredited. When Congress adopted the Bankruptcy Code, it adopted a new 28 U.S.C. §1334 to become effective April 1, 1984. While not explicitly repealing the old §1334, the adoption of a new section bearing the same section number effectively repealed the original §1334, especially in light of the fact that the original version adds nothing to §1471(a). *See* Countryman, *Emergency Rule Compounds Emergency,* 57 Am. Bankr. L. J. 1 (1983).

Regardless of whether old §1334 remains viable, in no event can §1334 be regarded as a source of district court jurisdiction over related proceedings. That section contains no broad language which would give the district courts jurisdiction over state law claims "related to" the bankruptcy proceeding.

Prior to the promulgation of §1471 and the 1978 Bankruptcy Code, it was well settled that §1334 did not bestow jurisdiction on the federal court simply because the trustee was a party. An action "related to" a bankruptcy was only maintainable in a federal court if there was diversity of citizenship between the bankrupt and the other party or if there was some other basis, independent of the bankruptcy, for federal subject matter jurisdiction. 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §3570 (1975). *French & Polyclinic Medical School & Health Center, Inc.* v. *Associated Hospital Service,* 387 F. Supp. 1359 (S.D.N.Y. 1973).

Thus, §1334, as the only valid remaining source of the district court's jurisdiction over matters and proceedings in bankruptcy, provides no power to the district court to

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[9] 28 U.S.C. §1334 provides:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy.

decide purely state-law claims.[10] Because the district court cannot possibly confer any greater jurisdiction than it has, it cannot rely on §1334 for its authority to enact the interim rule.

B. The Judiciary's Attempt To Cure the Constitutional Defect in §1471 By The Interim Rule Is a Violation of Separation of Powers.

The enactment of the interim rule is a judicial usurpation of legislative power in violation of the axiom of separation of powers. The judiciary, in enacting the interim rule, has usurped the legislative power in two ways: (1) by amending the statute and (2) by redefining the jurisdiction of the bankruptcy courts. In addition, it is a judicial action in derogation of this Court's holding in *Northern Pipeline*.

The concept of separation of powers is the cornerstone of our government. As such, it has been undauntedly protected by this Court. Recently, in *Immigration and Naturalization Service* v. *Chadha*, 462 U.S. ___ (1983), this Court accepted the undesirable task of reiterating that one branch of government cannot encroach upon the functions of another despite the purpose or benefit of the encroachment. It held:

> The fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives — or the hallmarks — of democratic government. . . .
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> * * *
>
> The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, legislative,

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[10] The district court in its opinions in this case suggested a variety of other bases of jurisdiction in the district courts. Numerous commentators have pointed out that none of these bases survive careful scrutiny. *See, e.g. In re Wildman*, No. 81-B-5869 (Bankr. N.D. Ill., May 6, 1983); Countryman, *Emergency Rule Compounds Emergency, supra.*

> executive and judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. *The hydraulic pressure inherent within each of the separate branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.*

N.Y. Times, June 24, 1983, at 12, col. 1, 3 (emphasis added).

In protecting this concept, the Court has not permitted the judiciary to succumb to the "hydraulic pressure." In *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978), the Court refused to encroach upon legislative functions despite the clear economic benefit of that action. It held:

> Here we are urged to view the Endangered Species Act "reasonably," and hence shape a remedy "that accords with some modicum of common sense and the public weal." . . . But is that our function? We have no expert knowledge on the subject of endangered species, much less do we have a mandate from the people to strike a balance of equities on the side of the Tellico Dam.
>
> * * *
>
> *Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end.*
>
> * * *
>
> *We agree with the Court of Appeals that in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with "common sense and the public weal." Our Constitution vests such responsbilities in the political branches.*

Tennessee Valley Authority, 437 U.S. at 194-95 (emphasis added).

The interim rule is a judicial usurpation of legislative power. The enactment is a clear attempt to rewrite a statute absent congressional action. This is apparent from the preface of the rule:

> The purpose of this rule is to supplement existing law and rules in respect to the authority of the bankruptcy judges of this district to act in bankruptcy cases and proceedings until Congress enacts appropriate remedial legislation in response to the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ____ U.S. ____, 102 S.Ct. 2858 (1982) or until March 31, 1984, whichever first occurs.

Powers of amendment and repeal are uniquely legislative in nature. *Busse* v. *Commissioner of Internal Revenue*, 479 F.2d 1147, 1152 (7th Cir. 1973). Indeed in *Northern Pipeline* this Court held:

> We think that it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Art III, in the way that will best effectuate the legislative purpose.

Northern Pipeline, 73 L. Ed. 2d at 625-26 n.40.

In addition, the rule usurps legislative power because it essentially redefines bankruptcy court jurisdiction. Whereas, under §§1471 and 1480, the bankruptcy courts had complete jurisdiction over "civil proceedings arising under title 11 and all related civil proceedings arising in or related to cases under title 11," including jury trials, under the rule such cases are only *referred to* bankruptcy courts, and jury trials are completely withheld. Furthermore, bankruptcy judges are prohibited from entering a judgment or dispositive order in related proceedings unless the parties consent to the entry of judgment or order by the bankruptcy judge. The rule therefore redefines and limits the bankruptcy jurisdiction granted the bankruptcy court in §1471.

The task of defining the jurisdiction of inferior courts is solely legislative. This Court has recognized that the

power given Congress to create inferior courts empowers Congress alone with the ability to define the jurisdiction of those courts. In *Palmore* v. *United States*, 411 U.S. 389 (1973) this Court stated:

> The decision with respect to inferior federal courts, as well as the task of defining their jurisdiction was left to the discretion of Congress. . . "(T)he judicial power of the United States . . . is (except in enumerated instances applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, *entirely upon the action of Congress, who possesses the sole power of creating tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction, either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.*

Palmore, 411 U.S. at 400-01 (emphasis added), quoting *Cary* v. *Curtis*, 3 How. 236, 245 (1845).

Similarly, in *Washington-Southern Navigation Co.* v. *Baltimore & Philadelphia S.B. Co.*, 263 U.S. 629, 635 (1924), Justice Brandeis, writing about the scope of the rule-making authority of courts, said:

> The function of rules is to regulate the practice of the court and to facilitate the transaction of its business. This function embraces, among other things, the regulation of the forms, operation, and effect of process; and the prescribing of forms, modes, and times for proceedings. Most rules are merely a formulation of the previous practice of the courts. Occasionally, a rule is employed to express, in convenient form, as applicable to certain classes of cases, a principle of substantive law which has been established by statute or decisions. ***But no rule of court can enlarge or restrict jurisdiction.*** (Emphasis added.)

The structure of our tripartite system forbids the judiciary from enacting the interim rule. Despite the exigency of the circumstances or the desirable purposes prompting the district court's action, the cure of the constitutional infirmity in §1471 and the redefinition of the bankruptcy court jurisdiction is within the sole province of Congress. The judiciary does not have the power to enact the interim rule.[11]

C. The Referral System Created By The Interim Rule, As It Is Applied To "Related Actions," Contains The Same Constitutional Defects As §1471.

In *Northern Pipeline*, declaring that the "judicial power of the United States must be exercised by courts having the attributes prescribed in Art III" (73 L. Ed. 2d at 607), the Supreme Court distinguished the authority purportedly granted to bankruptcy courts in §1471 from the powers of: (1) administrative agencies, which it said were empowered only as fact-finders to assist in the adjudication of "congressionally created statutory rights" (73 L. Ed. 2d at 622), and (2) federal magistrates, who have "substantially narrower" authority over pre-trial matters, subject to de novo *determination* by the district courts. The interim rule's

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[11] Neither can the judiciary acquire this legislative power from 11 U.S.C. §105, which says:

> (a) The bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.
>
> (b) Notwithstanding subsection (a) of this section, a bankruptcy court may not appoint a receiver in a case under this title.

Section 105 cannot be interpreted to give the district court a power that is constitutionally outside the scope of the judiciary. Pursuant to the tenet of separation of powers, under no circumstances can the judiciary have the authority to *legislate* by *amending* a statute.

Even if the judiciary could acquire power to enact the rule pursuant to 11 U.S.C. §105, the power would only rest in the bankruptcy court. 11 U.S.C. §105 speaks to the "bankruptcy court", not "courts of bankruptcy" (district courts). In no event can the district court acquire power to enact the rule pursuant to §105.

scheme of automatic referral of related proceedings to bankruptcy judges, retaining in the district court only the power to enter judgments and dispositive orders, is an unsuccessful attempt to permit bankruptcy judges to exercise powers like those which the Court has found permissible for non-Article III tribunals.

In *White Motor* the Sixth Circuit opined, "(t)he interim rule implants sufficient mechanisms in the existing system to ensure that bankruptcy cases are resolved through a constitutionally valid process." 704 F.2d at 263. It found that the interim rule did not conflict with *Northern Pipeline* or with Article III, because: (1) under the rule "bankruptcy courts perform a function similar to a magistrate or special master in cases which are only peripherally related to the bankrupt estate," (2) the district court could revoke the reference of a case, and (3) the district court may modify any holding or order of the bankruptcy court. 704 F.2d at 263.

The system erected by the interim rule, however, is patently unlike those approved for magistrates, special masters, and administrative agencies and contains many of the deficiencies specifically disapproved in *Northern Pipeline*. Federal Rule of Civil Procedure 53(b) permits reference to a special master only "upon a showing that some exceptional condition requires it." Such a reference is closely controlled by the district court's order of reference filed in the particular case and "shall be the exception and not the rule." Under the Federal Magistrates Act, 28 U.S.C. §636(b)(2), a magistrate may act as a special master without meeting the requirements of Federal Rule 53 only if the parties consent. By contrast, the automatic nonconsensual reference of thousands of cases to the bankruptcy court under the interim rule makes a mockery of the Sixth Circuit's conclusion that the bankruptcy courts perform a function similar to that of a special master.

The authority of the bankruptcy court under the interim rule is also unlike the adjunct functions referred to federal magistrates under the Federal Magistrates Act, 28 U.S.C. 636(b)(1)(B), and approved by the Supreme Court in *United States* v. *Raddatz*, 477 U.S. 667 (1980) and *Northern Pipeline*. As the Court noted in *Northern Pipeline:*

> Critical to the Court's decision to uphold the Magistrates Act was the fact that the ultimate decision was made by the district court.

73 L. Ed. 2d at 622-23.

The Federal Magistrates Act allows a district judge, in his discretion, to refer individual *pretrial* matters to magistrates for proposed findings of fact and recommendations for disposition. When an objection is made to the magistrate's findings, the district court judge is required to make a de novo *determination.* By contrast, under the interim rule, the district court *automatically* refers "related proceedings" wholesale to bankruptcy courts for adjudication. No initial determination of the suitability of the reference is made by a district court judge.

Evidently concerned about the rule's failure to require a de novo determination by the district court, both the district court and the Sixth Circuit have attempted to supply the missing procedure. Thus, the district court in this case said, "The interim rule clearly provides for de novo review by an Article III district judge of any proceeding 'related to' bankruptcy." 26 B.R. at 1022. In *White Motor,* the Circuit Court concluded:

> First, the bankruptcy judges may not issue binding judgments in "related" proceedings. In these cases, the bankruptcy judges are limited to submitting findings of fact and proposed rulings which must be reviewed *de novo* by the district court whether or not an appeal has been taken by the parties. See Rule (e)(2)(A)(iii).

704 F.2d at 263.

Neither of these statements suffices to make the rule comply with the command of *Raddatz* that the ultimate decision be *made* by the district court.

The Magistrates Act requires:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.

28 U.S.C. §636(b)(1)(C).

The interim rule, even as amplified by the district and Sixth Circuit courts, apparently requires no de novo *determination*, but only de novo *review* of the final judgment or order itself by the district court. Just as *Raddatz* recognized a substantive distinction between a de novo hearing and a de novo determination, there is a significant distinction between a de novo determination and a de novo review. This difference is clearly illustrated by the fact that the interim rule fails to distinguish the district court's review of a related case from its review on appeals of non-related matters.

II. THE CONFLICTS CREATED WITHIN THE FEDERAL JUDICIARY BY THE INTERIM RULE CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

"What a majority of the Supreme Court left to Congress to do cannot be done by a dissenting opinion, the Administrative Office, the Judicial Conference, or a district court rule." Countryman, *Emergency Rule Compounds Emergency*, 57 Am. Bankr. L.J. 1, 7 (1983). Notwithstanding this commonsense observation, the district courts, faced with the inaction of Congress in the wake of *Northern Pipeline*, have attempted to do what this Court said it would not do. In enacting the interim rule, they have found statutory authority where none exists and have "so far departed from the accepted and usual course of judicial proceedings" as to call for the "exercise of this Court's power of supervision." Sup. Ct. Rule 17.1(a).

It is uniquely within the power of this Court to supervise the lower federal courts and clarify the boundaries within which they may act. In the exercise of this power, this Court has delineated the extent of federal court jurisdiction (*Hagans* v. *Lavine*, 415 U.S. 528 (1974)), struck down local rules which exceed a court's rule-making power (*Miner* v. *Atlass*, 363 U.S. 641 (1960)), and restricted the authority of the lower courts to delegate responsibilities

conferred on them (*La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957)). The same action is called for here.

The widespread divergence of opinion among federal courts on the interim rule's validity is analogous to that situation which calls for this Court's intervention when there is a conflict among the circuit courts. With exceptions, bankruptcy courts have generally declared the rule unconstitutional and district courts have generally upheld it. Even the Sixth Circuit which refused to take Stouffer's appeal in this case, directing the parties' attention to its decision in *White Motor*, apparently has had second thoughts about the *White Motor* decision.

Unlike *Northern Pipeline* and the present case, the *White Motor* case was a true "bankruptcy case" and involved claims against the estate of the debtor. The bankruptcy court, at the request of the debtor, had appointed a special master to submit recommendations regarding the disposition of these claims. In an appeal to the district court several creditors challenged this procedure, and the district court vacated the bankruptcy court's order finding that the bankruptcy court had no jurisdiction to hear cases after the expiration of the stay of the *Northern Pipeline* decision.

The debtor appealed to the Sixth Circuit. Although none of the parties challenged the validity of the interim rule and the case did not require a decision on that issue, the Sixth Circuit nevertheless undertook the task. It decided specifically that §§1471(a) and (b) were unaffected by *Northern Pipeline*. 704 F.2d at 260.

Eleven days later, a different panel of the Sixth Circuit reached the opposite conclusion about *Northern Pipeline* in *Rhodes* v. *Stewart*, 705 F.2d 159 (6th Cir. 1983). In that case the court said:

> Accordingly, a plurality of six justices concluded that the jurisdictional grant of §1471 was unconstitutional *in toto* and could not be redeemed through division or severance of offending exercises of jurisdiction.

While that case did not involve the interim rule either, it clearly called into question the analysis in the *White Motor* decision and has been cited by at least one bankruptcy court

in the Sixth Circuit as overruling *White Motor. In re Johnson County Gas Company, Inc.*, No. 83-00002 (Bankr. Ct. E.D. Ky., June 13, 1983). If *White Motor*, as the circuit court stated, answered the questions raised by petitioner in this case, *Rhodes* v. *Stewart* called those answers into doubt.

CONCLUSION

The implications of this case reach far beyond the present litigants. At least one scholar has predicted that the interim rule is "of such dubious validity that the additional litigation it will provoke will bring about the same chaos it is supposed to avoid." Countryman, 57 Am. Bankr. L.J. at 3. Another commentator has said:

> Constitutionally, the rule sits upon a most precarious base. It has been promulgated outside the authority and according to which such rules may be promulgated and it deals with a number of matters in conflict with Acts of Congress and other rules of general application. It is vexatious at best by dealing with matters dealt with elsewhere and by dealing with them differently and inconsistently, so that the overall impression is of confusion and irresponsibility.

Vihon, *Delegation of Authority and the Model Rule: The Continuing Saga of Northern Pipeline*, 88 Com. L.J. 64, 76 (1983). Indeed, the rule places litigants, bankruptcy courts, and the entire federal court system in a posture which cannot be sanctioned by any responsible interpretation of judicial power, even in an "emergency" created by Congressional inaction. A resolution by this Court of the issues

raised in this petition is required. This Court should grant this petition and reverse the Order of the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 83-8024

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN THE MATTER OF:

NORTHLAND POINT PARTNERS,

Debtors

_____/

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, A NEW JERSEY CORPORATION,

Plaintiff,

vs

ORDER

THE STOUFFER CORPORATION, AN OHIO CORPORATION,

Defendant-Petitioner

_____/

NORTHLAND POINT PARTNERS, AN ILLINOIS LIMITED PARTNERSHIP,

Plaintiff,

vs

THE STOUFFER CORPORATION, AN OHIO CORPORATION,

Defendant-Petitioner

_____/

BEFORE: KEITH, MERRITT and WELLFORD, Circuit Judges

This cause comes before the Court upon the petition of The Stouffer Corporation for leave to appeal from an

order entered in the above-captioned proceeding by the district court for the Eastern District of Michigan on January 7, 1983 as expanded by a memorandum opinion dated February 8, 1983. See, 28 U.S.C. §1292(b); Rule 5, FRAP.

The Court's opinion in No. 82-3638, *White Motor Corp.* v. *Citibank, N.A., et al.*, (704 F.2d 254), (decided and filed April 1, 1983), would appear to answer questions presented by this request for interlocutory appeal. For this reason, the Court denies certification of the appeal under 28 U.S.C. §1292(b).

ENTERED BY THE ORDER OF THE COURT
John P. Hehman, Clerk

/s/ John P. Hehman

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In The Matter Of:

NORTHLAND POINT PARTNERS,

Debtors.

_____/

The PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Plaintiff,

v.

The STOUFFER CORPORATION,

Defendant.

_____/

NORTHLAND POINT PARTNERS,

Plaintiff,

v.

THE STOUFFER CORPORATION,

Defendant.

_____/

Bankruptcy No. 82-05387-W
Adv. No. 82-2277-W, 82-2332-W.

January 7, 1983

ORDER

DEMASCIO, District Judge.

This cause is before the court on appellant Stouffer Corporation's motion challenging the constitutionality of

an Interim Rule governing the administration of the bankruptcy system adopted by the United States District Court for the Eastern District of Michigan. After a careful review of the relevant statutory and case law, we remain persuaded that this Interim Rule, adopted in response to the Supreme Court's decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, ____ U.S. ____, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), is constitutional and valid.

We hold that *Marathon* does not create a jurisdictional lapse. The relevant statutory provisions taken singularly and conjunctively manifest the Congressional intention that at the very least federal district courts would retain jurisdiction of matters arising under Title 11 or arising in or related to cases under Title 11 until April 1, 1984. Congress carefully kept in effect, until 1984, statutory provisions that give the federal district courts "original jurisdiction, exclusive of the courts of the states, of all matters and proceedings in bankruptcy." 28 U.S.C. §1334. Congress also made clear, through incorporation by reference, that the jurisdictional powers of the federal district courts would not change during the transitional period. §§404 and 405, Bankruptcy Reform Act of 1978 (P.L. 95-598). Congress purposely included these provisions to satisfy its stated concern over the constitutionality of the broad jurisdictional grant afforded to bankruptcy judges under the act. It is apparent that Congress, at a minimum, wanted to maintain federal court jurisdiction over matters arising in bankruptcy proceedings.

Alternatively, it appears to us that the only jurisdictional grant that was deemed non-severable in *Marathon* was that given to the Article I bankruptcy courts. The two concurring justices noted that "This grant of authority is not readily severable from the remaining grant of authority to *bankruptcy courts*." *Marathon, id.* at ____, 102 S.Ct. at 2882. In considering the entire structure of the Bankruptcy Reform Act of 1978, it appears to us that the power conferred by 28 U.S.C. §1471(a) and (b) was arguably not affected by the *Marathon* decision. We recognize, however,

that Congress did not want federal district courts to permanently exercise the jurisdictional power found in such provisions as present §1334 of Title 28. *See, Marathon, id.* at ____, n.40, 102 S.Ct. at 2880, n.40. The district courts are vested at least until 1984 with jurisdiction over bankruptcy matters. The rule that Stouffer now challenges was promulgated in complete accord with the inherent power of an Article III federal district court to dispose of judicial matters that come before it. This interim rule provides that the district courts may delegate many of the duties they must perform under their bankruptcy power to bankruptcy judges. The authority for this is found in §105 of the Bankruptcy Reform Act of 1978 (11 U.S.C. §105), which gives courts of bankruptcy the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," and in Bankruptcy Rule 927, which gives bankruptcy courts the power to adopt "rules governing practice and procedure under the Act." This delegation of power is consistent with the long tradition established by Congress of a bankruptcy court consisting of two judicial officers and the clear intent of the Congress to continue a two-officer court of bankruptcy through 1984.

Accordingly, we hold that the Emergency Rule adopted by the United States District Court for the Eastern District of Michigan pursuant to a resolution of the Sixth Circuit Judicial Council is constitutional and valid. A more detailed analysis responding to all of appellant's contentions will be forthcoming in a Memorandum Opinion from this court.

NOW, THEREFORE, IT IS ORDERED that appellant Stouffer's motion challenging the Interim Rule be and the same hereby is DISMISSED;

IT IS FURTHER ORDERED that appellant's motion for a stay of bankruptcy proceedings be and the same hereby is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In The Matter of

NORTHLAND POINT PARTNERS,

Debtors.

_____/

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Plaintiff,

v.

The STOUFFER CORPORATION,

Defendant.

_____/

No. 82-05387-W
Adv. No. 82-2277-W.

February 8, 1983

MEMORANDUM OPINION

DEMASCIO, District Judge.

In August 1981, Stouffer Corporation (Stouffer) decided that it could no longer profitably operate Northland Inn as a hotel. Northland Point Partners (Northland Point), the landlord under a lease that expires in 1987, filed an action against Stouffer in the Oakland County Circuit Court seeking damages and specific performance of the lease to require Stouffer to continue to operate the hotel. Since the parties were of diverse citizenship, Stouffer removed the action to the United States District Court. The Prudential

Insurance Company of America (Prudential) declared its mortgage in default and took an assignment of the lease as the mortgagee of the property. Prudential filed a separate action against Stouffer in this court seeking an injunctive order requiring Stouffer to continue to manage and operate the property as a hotel. We denied Prudential's request for a preliminary injunction in September 1981. Several days therafter, Northland Point filed a Chapter 11 petition for reorganization in the bankruptcy court. Both actions against Stouffer were promptly removed to the bankruptcy court and consolidated for trial.

Stouffer has now moved pursuant to Federal Rules of Civil Procedure 12(h)(3) for dismissal of the bankruptcy proceedings contending that the bankruptcy court lacks subject matter jurisdiction under the interim rule adopted by the United States District Court or, in the alternative, for a withdrawal of the automatic reference to the bankruptcy court pursuant to that rule. Stouffer contends that the interim rule we adopted at the direction of the Judicial Council for the Sixth Circuit cannot confer jurisdiction upon the bankruptcy court to resolve its state-law dispute with Northland Point and Prudential. Specifically, Stouffer argues that neither the district court nor the judicial council has the power to promulgate a rule to fill the jurisdictional lapse created by congressional inaction after the Supreme Court's decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, ____ U.S. ____, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). We disagree. We find that Congress and the United States Supreme Court have long recognized the power of Article III courts, in the absence of legislation to the contrary, to administer the business properly brought before them. The United States District Court for the Eastern District of Michigan had the power to adopt the interim rule pursuant to a resolution of the Sixth Circuit Judicial Council.

In 1939, Congress, by legislation, created the Judicial Councils of the Circuits. 53 Stat. 1223. The power of these councils has continued, with minimum modifications, up

through the recent amendments to that statute. The pertinent grant of power to these councils, which are mainly composed of circuit judges, now reads as follows:

> §332 Judicial Councils —
>
> (d)(1) Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit . . .
>
> (2) All judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council.
>
> (3) Unless an impediment to the administration of justice is involved, regular business of the courts need not be referred to the council.

The Supreme Court has determined that this grant of power to the councils is constitutional, and that the statute did confer management powers on the council. *Chander* v. *Judicial Council of the Tenth Circuit,* 398 U.S. 74, 90 S.Ct. 1648, 26 L.Ed.2d 100 (1970). In his concurring opinion, Justice Harlan clarified the scope of §332 when he stated that:

> Within the framework of the statutes establishing the inferior courts and defining their jurisdiction, the Judicial Councils are charged with the duty to take such actions as are necessary for the expedition of the business of the courts in each circuit. *Id.,* at 108, 90 S.Ct. at 1665.

Two present Justices of the Supreme Court have informally noted on separate occasions the need for the judicial councils to assert the management power bestowed upon them by 28 U.S. §332. Chief Justice Burger, then a Judge of the District of Columbia Circuit, stated that:

> The Judicial Councils of the Circuits must assume and discharge the statutory duties,

> which Congress gave them at their own insistence in 1939. Under section 332 the Circuit Councils must operate as the active managing directors and give full effect to the policies and programs agreed upon in the expanded Judicial Conference of the United States. They must be managers, not just spectators, of how the courts are run.

The Courts on Trial, 22 F.R.D. 71, 82 (1958).

Later, Justice Brennan also commented on the need for the judicial councils to exercise the powers statutorily bestowed upon them. *The Continuing Education of the Judiciary in Improved Procedures*, 28 F.R.D. 42, 44 (1960). Justice Brennan noted that the failure of the councils to act would generate the mistaken belief that the councils did not have the statutory power to act. *Id.*, at 44.

These two Justices acknowledge, therefore, that Congress has statutorily affirmed the broad power of the judicial councils to manage the judicial business of the circuit. *See, In Re Imperial "400" National, Inc.*, 481 F.2d 41 (3d Cir. 1973). The Sixth Circuit Judicial Council acted pursuant to this grant of power when it promulgated its resolution directing the district courts of this circuit to adopt the interim rule. In turn, the United States District Court for the Eastern District of Michigan complied with the statute when it adopted the interim rule. 28 U.S.C. §332(d)(2). It is clear that the council's obligation to assure the "effective and expeditious administration of justice within this circuit" would have been ill-served if there had been no response to the Supreme Court's refusal to extend the stay in *Marathon*. Aside from this clear statutory grant of power to the judicial councils, there has long been recognized an inherent power of Article III courts "to provide themselves with appropriate instruments required for the performance of their duties." *Ex Parte Peterson*, 253 U.S. 300, 312, 40 S.Ct. 543, 547, 64 L.Ed. 919 (1920). *See Power Commission*

v. Interstate Gas Co., 336 U.S. 577, 588-89, 69 S.Ct. 775, 781, 93 L.Ed. 895 (1949) (Frankfurter, J., concurring); *Reed v. Cleveland Board of Education*, 607 F.2d 737, 746 (6th Cir. 1979).

Thus, Article III courts do have the power to administer themselves. We must next, however, determine whether there is any statutory provision that would preclude the exercise of this power in this particular instance. In making this examination, our principal concern is whether the federal courts have subject matter jurisdiction over bankruptcy proceedings after *Marathon*. We hold that *Marathon* did not create a jurisdictional lapse. Relevant statutory provisions taken singularly and conjunctively manifest the Congressional intention that, at the very least, federal district courts would retain jurisdiction of matters arising under Title 11 or arising in or related to cases under Title 11 until April 1, 1984. Congress carefully kept in effect, until 1984, a statutory provision that gives federal courts "original jurisdiction, exclusive of the courts of the states, of all matters and proceedings in bankruptcy." 28 U.S.C. §1334. Since Congress did enact a new §1334 to take effect in 1984, we cannot assume, as has been suggested, that Congress inadvertently continued present §1334 or that Congress intended to repeal it. *See*, 128 Cong. Rec. H 9641 (Daily Ed. December 13, 1982). Congress made clear, through incorporation by reference, that the jurisdictional powers of the federal district courts would not change during the transitional period. §§404 and 405, Bankruptcy Reform Act of 1978 (P.L. 95-598). There is a sound explanation for Congress' action in leaving §1334 intact. Congress was concerned about the constitutionality of the broad jurisdictional grant afforded to bankruptcy judges in the Bankruptcy Reform Act of 1978, and wanted to assure, at a minimum, that the federal courts maintained jurisdiction over bankruptcy proceedings. *See*, H.Rep. No. 595, 95th Cong., 2d Sess. 5, reprinted in 1978 U.S. Code Cong. and Ad.News 6023-6049 (Congressman Rodino solicited

opinions on the constitutionality of the proposed bankruptcy legislation from numerous constitutional scholars). We recognize, of course, that Congress did not intend that federal district courts would exercise indefinitely the jurisdictional grant contained in the present 28 U.S.C. §1334. *See, Marathon, id.* ___ U.S. ___, n.40, 102 S.Ct. at 2880, n.40. However, this limitation on the period in which federal district courts have jurisdiction over bankruptcy proceedings does not change the fact that Congress has vested the district courts at least until 1984 with jurisdiction over bankruptcy matters.

Since federal district courts still have jurisdiction over bankruptcy proceedings and the judicial councils have the power to direct the manner in which the business of the circuit will be administered, we hold that the cause of action against defendant Stouffer has been properly referred to a bankruptcy judge. Defendant's motion to dismiss will, therefore, be denied. The interim rule clearly provides for de novo review by an Article III district judge of any proceeding "related to" bankruptcy. *See,* Interim Rule d(3)(B). The Rule, therefore, satisfies the "judicial power" concerns raised by the plurality in *Marathon, id.* ___ U.S. at ___ - ___, 102 S.Ct. at 2873-2880; at 4899-4902; *See, Crowell* v. *Benson,* 285 U.S. 22, 51, 54, 52 S.Ct. 285, 292, 293, 76 L.Ed. 598 (1932). Since Stouffer has given no other reason for withdrawal of the reference to the bankruptcy court, its motion for withdrawal of reference will be denied. Accordingly, we reaffirm and incorporate by reference all of the provisions of our January 7, 1983 order as though fully set forth herein.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In The Matter Of:

NORTHLAND POINT PARTNERS,

Case No. 82-05387-W

Debtors.

_____/

The PRUDENTIAL INSURANCE COMPANY OF AMERICA, Plaintiff,

Adversary No. 82-2777-W

v.

The STOUFFER CORPORATION,

Defendant.

_____/

ORDER

This matter came before the court on defendant Stouffer's motion to certify for appeal pursuant to 28 U.S.C. §1292(b), our January 7, 1983 order, and February 8, 1983 memorandum opinion; and the court being of the view that the order and opinion pertain to an area of the law of first impression in this circuit and that certification for appeal may expedite the final disposition of the matters yet pending; and it appearing that the clerk inadvertently neglected to serve our previous order certifying this matter for appeal;

NOW, THEREFORE, IT IS ORDERED that the defendant's request to certify our January 7, 1983 order for appeal be and the same hereby is GRANTED.

/S/ Robert E. DeMascio
Robert E. DeMascio
United States District Judge

Dated: February 25, 1983

APPENDIX E: THE INTERIM RULE

The Rule set forth below is being adopted nationally by all Federal Circuit Councils and District Courts so that the bankruptcy system will continue without disruption. This Rule was adopted on December 13, 1982 by the United States District Court for the Eastern District of Michigan and shall become effective on December 25, 1982 unless before this date Congress enacts other legislation or the Supreme Court extends the stay on the *Marathon* decision.

(a) Emergency Resolution

The purpose of this rule is to supplement existing law and rules in respect to the authority of the bankruptcy judges of this district to act in bankruptcy cases and proceedings until Congress enacts appropriate remedial legislation in response to the Supreme Court's decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, ___ U.S. ___, 102 S. Ct. 2858 (1982), or until March 31, 1984, whichever first occurs.

The judges of the district court find that exceptional circumstances exist. These circumstances include: (1) the unanticipated unconstitutionality of the grant of power to bankruptcy judges in section 241(a) of Public Law 95-598; (2) the clear intent of Congress to refer bankruptcy matters to bankruptcy judges; (3) the specialized expertise necessary to the determination of bankruptcy matters; and (4) the administrative difficulty of the district courts' assuming the existing bankruptcy caseload on short notice.

Therefore, the orderly conduct of the business of the court requires this referral of bankruptcy cases to the bankruptcy judges.

(b) Filing of bankruptcy papers

The bankruptcy court constituted by §404 of Public Law 95-598 shall continue to be known as the United States Bankruptcy Court of this district. The Clerk of the Bankruptcy Court is hereby designated to maintain all files in bankruptcy cases and adversary proceedings. All papers in cases or proceedings arising under or related to Title 11 shall be filed with the Clerk of the Bankruptcy Court regardless of whether the case or proceeding is before a bankruptcy judge or a judge of the district court, except that a judgment by the district judge shall be filed in accordance with Rule 921 of the Bankruptcy Rules.

(c) Reference to Bankruptcy Judges

(1) All cases under Title 11 and all civil proceedings arising under Title 11 or arising in or related to cases under Title 11 are referred to the bankruptcy judges of this district.

(2) The reference to a bankruptcy judge may be withdrawn by the district court at any time on its own motion or on timely motion by a party. A motion for withdrawal of reference shall not stay any bankruptcy matter pending before a bankruptcy judge unless a specific stay is issued by the district court. If a reference is withdrawn, the district court may retain the entire matter, may refer part of the matter back to the bankruptcy judge, or may refer the entire matter back to the bankruptcy judge with instructions specifying the powers and functions that the bankruptcy judge may exercise. Any matter in which the reference is withdrawn shall be reassigned to a district judge in accordance with the court's usual system for assigning civil cases.

(3) Referred cases and proceedings may be transferred in whole or in part between bankruptcy judges within the district without approval of a district judge.

(d) Powers of Bankruptcy Judges

(1) The bankruptcy judges may perform in referred bankruptcy cases and proceedings all acts and

duties necessary for the handling of those cases and proceedings except that the bankruptcy judges may not conduct:

(A) a proceeding to enjoin a court;

(B) a proceeding to punish a criminal contempt —

(i) not committed in the bankruptcy judge's actual presence; or

(ii) warranting a punishment of imprisonment;

(C) an appeal from a judgment, order, decree, or decision of a United States bankruptcy judge; or

(D) jury trials.

Those matters which may not be performed by a bankruptcy judge shall be transferred to a district judge.

(2) Except as provided in (d)(3), orders and judgments of bankruptcy judges shall be effective upon entry by the Clerk of the Bankruptcy Court, unless stayed by the bankruptcy judge or a district judge.

(3) (A) Related proceedings are those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or a state court. Related proceedings include, but are not limited to, claims brought by the estate against parties who have not filed claims against the estate. Related proceedings do not include: contested and uncontested matters concerning the administration of the estate; allowance of and objection to claims against the estate; counterclaims by the estate in whatever amount against persons filing claims against the estate; orders in respect to obtaining credit; orders to turn over property of the estate; proceedings to set aside preferences and fraudulent conveyances; proceedings in respect to lifting of the automatic stay; proceedings to determine dischargeability of particular debts; proceedings to object to the discharge; proceedings in respect to the confirmation of

plans; orders approving the sale of property where not arising from proceedings resulting from claims brought by the estate against parties who have not filed claims against the estate; and similar matters. A proceeding is not a related proceeding merely because the outcome will be affected by state law.

(B) In related proceedings the bankruptcy judge may not enter a judgment or dispositive order, but shall submit findings, conclusions, and a proposed judgment or order to the district judge, unless the parties to the proceeding consent to entry of the judgment or order by the bankruptcy judge.

(e) District Court Review

(1) A notice of appeal from a final order or judgment or proposed order or judgment of a bankruptcy judge or an application for leave to appeal an interlocutory order of a bankruptcy judge, shall be filed within 10 days of the date of entry of the judgment or order or of the lodgment of the proposed judgment or order. As modified by sections (e) 2A and B of this rule, the procedure set forth in Part VIII of the Bankruptcy Rules apply to appeals of bankruptcy judges' judgments and orders and the procedures set forth in Bankruptcy Interim Rule 8004 apply to applications for leave to appeal interlocutory orders of bankruptcy judges. Modification by the district judge or the bankruptcy judge of time for appeal is governed by Rule 802 of the Bankruptcy Rules.

(2) (A) A district judge shall review:

(i) an order or judgment entered under paragraph (d)(2) if a timely notice of appeal has been filed or if a timely application for leave to appeal has been granted;

(ii) an order or judgment entered under paragraph (d)(2) if the bankruptcy judge certifies that circumstances require that the order or judgment be approved by a district judge, whether or not the matter was

controverted before the bankruptcy judge or any notice of appeal or application for leave to appeal was filed; and

(iii) a proposed order or judgment lodged under paragraph (d)(3), whether or not any notice of appeal or application for leave to appeal has been filed.

(B) In conducting review, the district judge may hold a hearing and may receive such evidence as appropriate and may accept, reject, or modify, in whole or in part, the order or judgment of the bankruptcy judge, and need give no deference to the findings of the bankruptcy judge. At the conclusion of the review, the district judge shall enter an appropriate order or judgment.

(3) When the bankruptcy judge certifies that circumstances require immediate review by a district judge of any matter subject to review under paragraph (e)(2), the district judge shall review the matter and enter an order or judgment as soon as possible.

(4) It shall be the burden of the parties to raise the issue of whether any proceeding is a related proceeding prior to the time of the entry of the order or judgment of the district judge after review.

(f) Local Rules

In proceedings before a bankruptcy judge, the local rules of the bankruptcy court shall apply. In proceedings before a judge of the district court, the local rules of the district court shall apply.

(g) Bankruptcy Rules and Title IV of Public Law 95-598

Courts of bankruptcy and procedure in bankruptcy shall continue to be governed by Title IV of Public Law 95-598 as amended and by the bankruptcy rules prescribed by the Supreme Court of the United States pursuant to 28 U.S.C. §2075 and limited by SEC. 405(d) of the Act, to the extent that such Title and Rules are not inconsistent with

the holding of Northern Pipeline Construction Co. v. Marathon Pipe Line Co., ___ U.S. ___, 102 S. Ct. 2858 (1982).

(h) Effective Date and Pending Cases

This rule shall become effective December 25, 1982, and shall apply to all bankruptcy cases and proceedings not governed by the Bankruptcy Act of 1898 as amended, and filed on or after October 1, 1979. Any bankruptcy matters pending before a bankruptcy judge on December 25, 1982 shall be deemed referred to that judge.

APPENDIX F: DISTRICT COURT AMENDED ADMINISTRATIVE ORDER

In Re: Administration of Bankruptcy Cases in the United States District Court for the Eastern District of Michigan. 83X01002

Amended
Administrative Order

TO THE CLERK,
U. S. BANKRUPTCY COURT:

On December 13, 1982, the Judges of the United States District Court for the Eastern District of Michigan adopted an emergency rule governing the administration of the Bankruptcy system. To implement the emergency rule, you are hereby ordered to assist the Court in the following ways:

1) The Clerk of the United States District Court shall prepare special assignment decks to permit reassignment of Bankruptcy cases to District Judges in accordance with the Court's usual system for assigning civil cases. The first deck shall contain ten cards for each active judge in the Detroit and Ann Arbor administrative units and five cards for each Senior Judge and the Chief Judge. Each subsequent deck shall contain the same number of cards adjusted to reflect reassignment of cases in matters of disqualification or related cases. The Clerk of the United States District Court shall certify to the Clerk of the Bankruptcy Court that assignment decks prepared pursuant to this administrative order conform with all procedures used in preparing decks for the District Court's usual system for assigning cases.

2) In the assignment of Bankruptcy matters to District Judges under this emergency rule, it is the policy of the District Court that all matters arising out of any bankrupt estate shall be assigned to a single District Judge.

3) Except as otherwise provided in Paragraph 4, the Clerk of the Bankruptcy Court shall assign new bankruptcy matters from the assignment decks authorized by this order. If, prior to December 25, 1982, one or more notices of appeal in a case have already been assigned to one or more district judge, then the new bankruptcy matter shall be assigned to the District Judge with the lower civil case number. If, after December 25, 1982, a bankruptcy matter is assigned to a District Judge for the first time, any subsequent matter in that bankruptcy case requiring action by a District (sic) Judge shall be assigned to the same District Judge.

4) The Judges of the United States District Court for the Eastern District of Michigan authorize the Chief Judge for a period of sixty days from December 25 to assign to Judge Robert E. DeMascio challenges to the constitutionality or to the interpretation of the emergency rule.

5) Appeals already pending in bankruptcy matters which have been filed in the Clerk's office of the U.S. District Court shall continue to be maintained in the Clerk's Office of the U.S. District Court, and all papers in those cases shall be filed with the Clerk of the U.S. District Court.

6) Until further direction from the Statistical Analysis and Reports Division of the Administrative Office of the U.S. Courts, the Clerk of the U.S. Bankruptcy Court shall make a monthly report to the Clerk of the U.S. District Court on the third business day of each month concerning all bankruptcy matters assigned to or terminated by any U.S. District Judge during the preceding month.

For the Court:
Chief Judge John Feikens
January 4, 1983

APPENDIX G

CONSTITUTION OF THE UNITED STATES

ARTICLE III, §§1 AND 2

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, and public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

APPENDIX H-1

28 U.S.C. §636b

(b) (1) Notwithstanding any provision of law to the contrary —

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.

The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53 (b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

APPENDIX H-2

28 U.S.C. §1471. Jurisdiction

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

(d) Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.

(e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case.

APPENDIX H-3

28 U.S.C. §1480. Jury trials

(a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury, in a case under title 11 or in a proceeding arising under title 11 or arising in or related to a case under title 11, that is provided by any statute in effect on September 30, 1979.

(b) The bankruptcy court may order the issues arising under section 303 of title 11 to be tried without a jury.

APPENDIX I

FEDERAL RULE OF CIVIL PROCEDURE 53(b)

(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

APPENDIX J-1

Bankruptcy Court Decisions

In re Johnson County Gas Co., Inc., No. 83-00002 (Bk. Ct. E.D. Ky. June 13, 1983); *In the Matter of Seven Springs Apartments*, No. 81-01328A 10 B.C.D. 634 (Bk. Ct. N.D. Ga. May 31, 1983); *In re Wildman*, No. 81 B 5869 (Bk. Ct. N.D. Ill., May 6, 1983); *In re Williamson*, 10 B.C.D. 298 (Bk. Ct. M.D. Ga. March 14, 1983); *In re Otero Mills, Inc.*, 10 B.C.D. 89, 21 B.R. 645 (Bk. Ct. D. New Mex. Feb. 18, 1983); *In re Richardson*, Bk. No. 82C-00736, Civ. No. 82PC-0746 (Bk. Ct. D. Utah Feb. 7, 1983), *rev'd* 10 B.C.D. 182, 27 B.R. 962 (D. Utah Feb. 22, 1983); *In re Color Craft Press, Ltd.*, 10 B.C.D. 53, 27 B.R. 392 (Bk. Ct. D. Utah Feb. 7, 1983), *rev'd* 10 B.C.D. 182, 27 B.R. 962 (D. Utah Feb. 22, 1983); *In re Herrera*, 10 B. C. D. 123 (Bk. Ct. D. Col. Feb. 2, 1983); *In re Jorges Carpet Mills, Inc.*, 10 B.C.D. 1, 27 B.R. 333 (Bk. Ct. E.D. Tenn. Jan. 31, 1983); *In re Matlock Trailer Corp.*, Bk. No. 382-02778, Adv. No. 382-0755 (Bk. Ct. M.D. Tenn. Jan. 26, 1983), *rev'd* 27 B.R. 318 (M.D. Tenn. Feb. 23, 1983); *In re Conley*, 10 B.C.D. 10, 26 B.R. 885 (Bk. Ct. M.D. Tenn. Jan. 26, 1983); *In re Lifeguard Industries*, 26 B.R. 858 (Bk. Ct. S.D. Ohio, Jan. 19, 1983); *In re Egeria Societa*, 9 B.C.D. 1312, 26 B.R. 494 (Bk. Ct. E.D. Va. Jan 14, 1983); *In re Independence Savings Bank*, 9 B.C.D. 1274, 26 B.R. 127 (Bk. Ct. E.D. N.Y. Jan. 7, 1983); *In re Schear Realty & Investment Co., Inc.*, 9 B.C.D. 1210, 25 B.R. 463 (Bk. Ct. S.D. Ohio Jan. 4, 1983).

APPENDIX J-2

District Court Decisions

In re Q1 Corporation v. Victor Reichenstein, 28 B.R. 647 (E.D. N.Y. March 22, 1983); *Moody v. Martin*, 27 B.R. 991 (W.D. Wis. March 7, 1983); *In re Matlock Trailer Corp.*, 27 B.R. 318 (M.D. Tenn. Feb. 23, 1983); *In re Color Craft, Inc.* and *In re Richardson*, 10 B.C.D. 182, 27 B.R. 962 (D. Utah Feb. 22, 1983); *In re Braniff Airways, Inc.*, Misc. No. 4-221-E (N.D. Tex. 1983); *In re Northland Point Partners*, 26 B.R. 860 (E.D. Mich. Jan. 7, 1983), ordered adhered to 26 B.R. 1019 (E.D. Mich. Feb. 8, 1983); *KFC Corp. v. Milton*, 27 B.R. 158 (E.D. Va. January 25, 1983); *Todd v. New York Telephone Co.*, No. 82-CV-1177 (N.D.N.Y. January 24, 1983).

APPENDIX J-3

Circuit Court Decisions

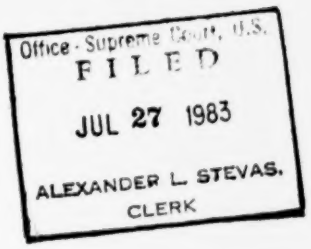
White Motor Corporation v. Citibank, N.A., 704 F.2d 254 (6th Cir. April 1, 1983); *In re Hansen*, 702 F.2d 728 (8th Cir. March 23, 1983); *In re Braniff Airways*, 700 F.2d 214 (5th Cir. Feb. 28, 1983).

APPENDIX J-4

Petitions to The Supreme Court

In re Hansen, No. 82-1802, petition for cert. filed, May 4, 1983, 51 U.S.L.W. 3827; *American Airlines Inc. v. Braniff Airways, Inc.*, cert. denied, 51 U.S.L.W. 3837 (May 23, 1983); *In re International Harvester Co.*, petition for prohibition and/or mandamus denied, 51 U.S.L.W. 3785 (April 18, 1983); *In re Doan*, petition for mandamus and/or prohibition denied, 51 U.S.L.W. 3716 (April 4, 1983); *In re Keene Corp.*, petition for prohibition and/or mandamus denied, 51 U.S.L.W. 3613 (Feb. 22, 1983).

NO. 83-34
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983



IN THE MATTER OF:

NORTHLAND POINT PARTNERS,

Debtor.

_____/

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a New Jersey corporation,

Respondent,

v.

THE STOUFFER CORPORATION, an Ohio corporation,

Petitioner.

_____/

NORTHLAND POINT PARTNERS, an Illinois limited partnership,

Respondent,

v.

THE STOUFFER CORPORATION, an Ohio corporation,

Petitioner.

_____/

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CERTIFICATE OF SERVICE

W. A. Steiner, Jr.
Dykema, Gossett, Spencer, Goodnow & Trigg
Attorneys for Petitioner
400 Renaissance Center - 35th Floor
Detroit, Michigan 48243
(313) 568-6924

CERTIFICATE OF SERVICE

State of Michigan)
) ss
County of Wayne)

W. A. Steiner, Jr., being duly sworn, deposes and says that he is counsel for the Petitioner in this matter and on July 26, 1983, he served a copy of the Pleading In Compliance With Supreme Court Rule 28.1 and Certificate of Service upon the attorneys for the Respondents by placing same in an envelope addressed as follows:

John E. Amerman, Esq.
Honigman Miller Schwartz & Cohn
2290 First National Building
Detroit, Michigan 48226

Donald B. Lifton, Esq.
Schlussel, Lifton, Simon, Rands,
Kaufman, Lesinski & Jackier
29201 Telegraph Road, Suite 500
Southfield, Michigan 48034

and depositing same in the mail, first class postage prepaid.

All parties required to be served have been served.

W. A. Steiner, Jr.

Subscribed and sworn to before me this 26th day of July, 1983.

MARY H. FITCH
Notary Public, Macomb County, MI
My Commission Expires Sept. 2, 1985
Acting in Wayne County

NO. 83-34
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

IN THE MATTER OF:

NORTHLAND POINT PARTNERS,

Debtor.

_____/

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a New Jersey corporation,

Respondent,

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THE STOUFFER CORPORATION, an Ohio corporation,

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_____/

NORTHLAND POINT PARTNERS, an Illinois limited partnership,

Respondent,

v.

THE STOUFFER CORPORATION, an Ohio corporation,

Petitioner.

_____/

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PLEADING IN COMPLIANCE WITH SUPREME COURT RULE 28.1

On July 11, 1983, The Stouffer Corporation filed a Petition for Writ of Certiorari in this Court. Supreme Court Rule 28.1

requires the listing of parent companies, subsidiaries, and affiliates.

The parent corporation of The Stouffer Corporation is Nestle Enterprises, Inc., a Connecticut corporation, which is a wholly-owned subsidiary of Nestle S.A., a Swiss corporation. The Stouffer Corporation has two subsidiaries which are not wholly-owned: Houston, S.I., Inc., a Texas corporation; and Lisco-Florida, Inc., a Florida corporation.

W. A. Steiner, Jr.
Dykema, Gossett, Spencer, Goodnow & Trigg
400 Renaissance Center - 35th Floor
Detroit, Michigan 48243
(313) 568-6924

Dated: July 26, 1983